

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 JESUS LOPEZ, ) Civil No.13-0597-BEN(WVG)  
12 )  
13 Plaintiff, ) ORDER GRANTING  
14 ) DEFENDANTS' *EX PARTE*  
15 v. ) MOTION COMPELLING  
16 ) INDEPENDENT MEDICAL  
CITY OF IMPERIAL, et al., ) EXAMINATIONS OF PLAINTIFF  
Defendants. ) (DOC. NO. 19)  
\_\_\_\_\_)  
17

18 Defendants have filed an *Ex Parte* Motion Compelling  
19 Independent Medical Examinations ("IMEs") of Plaintiff  
20 ("Motion"). Plaintiff has filed an Opposition to Defen-  
21 dants' Motion. Defendants have filed a Reply to Plain-  
22 tiff's Opposition and a Supplemental Brief. The Court,  
23 having reviewed the moving, opposition, reply and supple-  
24 mental papers of counsel, and the record in this case,  
25 HEREBY GRANTS Defendants' Motion.

26 A. BACKGROUND

27 On December 12, 2012, Plaintiff filed his Complaint  
28 in the Imperial County Superior Court. On March 14, 2013,

1 Defendants removed the case to this Court. The Complaint  
2 contains, *inter alia*, allegations regarding the damages  
3 suffered by Plaintiff as a result of the incident de-  
4 scribed in the Complaint. The damages alleged in the  
5 Complaint stem from (a) a severe concussion; (b) torn  
6 ligaments in Plaintiff's knees and forearm; (c) severe  
7 burns from mace or pepper spray; and (d) Plaintiff may  
8 need surgery on his knee and removal of a testicle.  
9 (Complaint at 4, para. XII).

10 On July 1, 2013, the Court issued a Case Management  
11 Conference Order Regulating Discovery ("CMC Order"). The  
12 CMC Order states, in pertinent part, that (a) on or before  
13 December 20, 2013, all fact discovery shall be completed;  
14 (b) on or before January 24, 2014, the parties shall  
15 exchange a list of all expert witnesses to be called at  
16 trial; (c) any party may supplement its expert designation  
17 by February 7, 2014; (d) designated expert witnesses shall  
18 provide to all other parties their expert witness reports  
19 by March 7, 2014; and (e) designated expert witnesses may  
20 supplement their expert reports to contradict or rebut  
21 evidence on the same subject matter identified in an  
22 expert report submitted by another party, by April 4,  
23 2014.

24 On June 14, 2013, Defendants received Plaintiff's  
25 medical records which presumably supported<sup>1/</sup> Plaintiff's  
26  
27

---

28 <sup>1/</sup>Defendants do not inform the Court about the contents of the medical  
records received.

1 allegations regarding the injuries Plaintiff sustained as  
2 a result of the incident described in the Complaint.

3 On December 3, 2013, Defendants took Plaintiff's  
4 deposition. At the deposition, Plaintiff testified regard-  
5 ing his injuries. His testimony included that he suffers  
6 from (a) neck, back and leg pain; (b) testicle pain; (c)  
7 memory loss; (d) headaches; and (e) jaw pain.

8 On December 13, 2013, Plaintiffs and Defendants  
9 filed a Joint Motion For Continuance of Discovery Dates.  
10 On December 17, 2013, the Court issued an Order Granting  
11 In Part And Denying In Part the Joint Motion. In the  
12 Order, the Court quoted from paragraph 5 of the CMC Order  
13 issued in this case, which clearly states:

14 ... all discovery under **Rules 30-36** of the  
15 Federal Rules of Civil Procedure must be  
16 initiated a sufficient period of time in  
17 advance of the (discovery) cut-off date, so  
18 *that it may be completed* by the cut-off date,  
taking into account the times for services,  
notice and response as set forth in the Fed-  
eral Rules of Civil Procedure. (emphasis  
added).

19 The Order also allowed further discovery to be  
20 conducted, but limited that discovery "to only that  
21 reasonably raised by Plaintiff's deposition." ("December  
22 17, 2013 Order," at 3). The Order extended the discovery  
23 cut-off date to January 20, 2014 for the above-noted  
24 discovery.

25 Defendants now seek the IMEs of Plaintiff by a  
26 neurosurgeon, orthopedist, dentist/oral surgeon<sup>2/</sup>, and

---

27  
28 <sup>2/</sup>On December 27, 2013, Plaintiff's counsel agreed to allow Defendants to  
conduct an IME by a dentist. Therefore, the Court will not address the propriety  
of that IME in this Order.

1 urologist. Defendants argue that at Plaintiff's December  
2 3, 2013 deposition, they became aware of Plaintiff's  
3 continuing complaints of (a) neck, back and leg pain; (b)  
4 testicle pain; (c) memory loss; (d) headaches; and (e) jaw  
5 pain. Plaintiff opposes the IMEs as requested by Defen-  
6 dants because the sought IMEs are not follow-up to discov-  
7 ery on issues raised in Plaintiff's deposition.

8 B. FEDERAL RULE OF CIVIL PROCEDURE 35

9 Federal Rule of Civil Procedure 35 authorizes a  
10 court to "order a party whose... physical condition... is  
11 in controversy to submit to a physical... examination by  
12 a suitably licensed or certified examiner." Fed. R. Civ.  
13 P. 35(a)(1). However, the order "may be made only on a  
14 motion for good cause." Fed.R. Civ. P. 35(a)(2)(A). These  
15 requirements necessitate "an affirmative showing by the  
16 movant that each condition as to which the examination is  
17 sought is really and genuinely in controversy and that  
18 good cause exists for ordering each particular examina-  
19 tion." Juarez v. Autozone Stores, Inc., 2011 WL 1532070 at  
20 \*1 (S.D. Cal. 2011), citing Schlagenhauf v. Holder, 379  
21 U.S. 104, 118 (1964).

22 Factors that courts have considered in assessing  
23 whether "good cause" exists include, but are not limited  
24 to, "the possibility of obtaining the desired information  
25 by other means, whether Plaintiff plans to prove (his)  
26 claim through the testimony of expert witnesses, whether  
27 Plaintiff is claiming ongoing (injury)." Juarez, supra at  
28 \*1, citing Impey v. Office Depot, Inc., 2010 WL 2985071 at

1 \*21 (N.D. Cal. 2010), Turner v. Imperial Stores, 161  
2 F.R.D. 89, 97-98 (S.D. Cal. 1995).

3 Fed. R. Civ. P. 35 does not specify a deadline for  
4 conducting an IME. Guitron v. Wells Fargo Bank, 2011 WL  
5 6012595 at \*1 (N.D. Cal. 2011). Some courts do not catego-  
6 rize Rule 35 examinations as either "non-expert" or  
7 "expert" discovery. Lester v. Mineta, 2006 WL 3741949 at  
8 \*1-2 (N.D. Cal. 2006). However, some courts have found  
9 that Fed.R.Civ. P. 26(a)(2) requires that the IME report  
10 be produced at the time of expert witness disclosures,  
11 meaning that an IME must occur before expert witness  
12 disclosures. Miksis v. Howard, 106 F.3d 754, 758 (7<sup>th</sup> Cir.  
13 1997). But in Minnard v Rotech Health, Inc., 2008 WL  
14 150502 at \*2-3 (E.D. CA 2008), the court determined that  
15 an IME report is an expert witness report because the  
16 examining expert would not merely recite the objective  
17 results of the examination, but would interpret the  
18 results and offer conclusions and opinions for the trier  
19 of fact. Minnard has been followed by Silva v. Mercado  
20 Food Enterprise, Inc., 2012 WL 174926 at \*5 (E.D. CA  
21 2012).

22 The law in this area does not appear to be well  
23 settled. Whether IMEs are fact or expert witness discovery  
24 certainly could influence the outcome of this dispute.  
25 Perhaps IMEs are best described as hybrid, both fact and  
26 expert witness discovery, depending on which view one  
27 finds most persuasive. One view of Rule 35 is that IME  
28 examiners are "experts employed only for trial prepara-

tion," pursuant to Fed. R. Civ. P. 26(b)(4)(B). As such, a court will typically allow an examinee to depose or call a Rule 35 IME examiner as a witness on a showing of "exceptional circumstances." Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 671-672 (E.D. WA 2000); Carroll v. Praxair, Inc., 2007 WL 437697 at \*2 (W.D. LA 2007). Of course, Rule 35 IMEs often arise in the context of developing expert testimony for trial with the expert witnesses then subject to the discovery obligations of Rules 26 and 30.

As discussed later in footnote 3 of this Order, clearly the parties, and especially Defendants, were dilatory in not moving for IMEs before now, notwithstanding that Plaintiff has just recently been deposed. Defendants had sufficient information available to them from the Complaint alone and from Plaintiff's medical records they obtained during discovery, to give them ample reason and sufficient justification to seek Rule 35 IMEs before now during fact discovery. Fortunately for Defendants, given the lack of clarity as to whether IMEs are relegated to fact discovery or cross over into expert discovery, the Court will give the benefit of the doubt to Defendants, especially in light of the delay in deposing Plaintiff.

Accordingly, the Court tends to agree with Minnard and Silva. If the IME examiner will offer opinions and conclusions regarding the objective facts derived from an examination, the IME and the report produced by the IME examiner is expert discovery, not fact discovery. There-

1 fore, the timing of a motion for an IME is dictated by the  
2 terms of the scheduling order regarding expert witness  
3 discovery, as set forth in the case.

4 Here, the CMC Order issued in this case states that  
5 Plaintiff and Defendants have until January 24, 2014 to  
6 designate expert witnesses to be called at trial. There-  
7 fore, Defendant's Motion To Compel the requested IMEs is  
8 timely.

9 C. GOOD CAUSE EXISTS TO ORDER THE IMES REQUESTED BY  
10 DEFENDANTS

11 As previously noted in this Order, Plaintiff testi-  
12 fied at his deposition that he continues to suffer from  
13 (a) neck, back and leg pain; (b) testicle pain; (c) memory  
14 loss; (d) headaches; and (e) jaw pain. Defendants seek  
15 IMEs by a neurosurgeon (presumably to examine Plaintiff  
16 and offer a report and testimony regarding Plaintiff's  
17 concussion, memory loss and headaches), an orthopedist  
18 (presumably to examine Plaintiff and offer a report and  
19 testimony regarding Plaintiff's neck, back, knee, and leg  
20 pain), and a urologist (presumably to examine Plaintiff  
21 and offer a report and testimony regarding Plaintiff's  
22 testicle pain).

23 1. Good Cause Factors

24 The Court must find good cause to order the IMEs  
25 requested by Defendants. Therefore, the Court analyzes  
26 below the factors commonly used to find good cause:

27 a. The possibility of obtaining the information  
28 by other means

Here, there is no possibility that Defendants can  
obtain the information, opinions and conclusions of an

1 expert witness pursuant to Rule 35 in any other way, but  
2 to have Plaintiff submit to the IMEs. Defendants are not  
3 required to simply rely on Plaintiff's expert witnesses  
4 regarding Plaintiff's injuries and the damages he suffered  
5 therefrom. Therefore, this factor weighs in favor of  
6 Defendants.

7 b. Whether Plaintiff intends to prove his claims  
8 of injuries sustained through the testimony of  
9 expert witnesses

10 At this time, the Court can not conclude that  
11 Plaintiff intends to prove his sustained injuries through  
12 the testimony of expert witnesses. As previously noted in  
13 this Order, Plaintiff's and Defendants' expert witness  
14 disclosures have been ordered to be made on January 24,  
15 2014. The Court notes that if Plaintiff does not designate  
16 an expert witness to testify about one or some of his  
17 alleged injuries, an IME regarding that alleged injury may  
18 not be necessary or required. As a result, this factor  
19 does not weigh in favor of Plaintiff or Defendants.

20 c. Whether the desired materials are relevant

21 Plaintiff claims numerous injuries that resulted  
22 from the incident described in the Complaint. The alleged  
23 injuries serve as the basis for Plaintiff's claimed  
24 damages. There can be little dispute that the information,  
25 opinions, and conclusions pertaining to Plaintiff's  
26 alleged injuries that will be presented after the re-  
27 quested IMEs are relevant to Plaintiff's claims in this  
28 action. Therefore, this factor weighs in favor of Defen-  
dants.



1                   d. Whether Plaintiff claims ongoing injuries

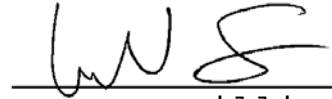
2           As previously noted in this Order, Plaintiff testi-  
3   fied at his December 3, 2013 deposition that he continues  
4   to suffer from numerous injuries sustained in the incident  
5   described in the Complaint. Therefore, this factor weighs  
6   in favor of Defendants.

7           The analysis of the factors noted above show, and  
8   the Court finds, that good cause exists to order the IMEs  
9   as requested by Defendants. Plaintiff's Ex Parte Motion  
10   Compelling Independent Medical Examinations of Plaintiff  
11   is GRANTED. The IMEs requested by Defendants shall be  
12   scheduled immediately and shall comply with the require-

ments of Fed. R. Civ. P. 35.<sup>3/</sup>

IT IS SO ORDERED.

DATED: January 21, 2014



Hon. William V. Gallo  
U.S. Magistrate Judge

---

<sup>3/</sup>The Court notes that Defendants' Motion, Plaintiff's Opposition and Defendants' Reply are severely lacking in the analysis of whether Plaintiff's Motion was timely filed, whether IMEs are subject to the fact discovery cut-off or the expert witness discovery cut-off, and whether good cause exists for the Court to order the IMEs requested by Defendants. As previously noted in the December 17, 2013 Order of this Court, it appears that Plaintiff and Defendants have not been diligent in pursuing and defending this action.

As soon as Defendants were served with Plaintiff's Complaint, they were aware that some of Plaintiff's alleged damages stemmed from orthopedic and testicular injuries. Yet, Defendants waited until December 3, 2013, almost one year after the Complaint was filed, to take Plaintiff's deposition at which they confirmed that Plaintiff's injuries were ongoing. The Court has not been made fully aware of how long Plaintiff's deposition was delayed due to his health problems. However, had Defendants taken Plaintiff's deposition earlier in this litigation, they would have learned about Plaintiff's other alleged injuries. Instead, they waited until approximately three weeks before the fact discovery cut-off to learn about Plaintiff's other alleged injuries, and to seek IMEs of Plaintiff, without analyzing whether an IME is fact or expert witness discovery, thereby believing that they needed to file an ex parte motion to compel the requested IMEs.

Despite the court's warning in the December 17, 2013 Order that the parties immediately begin discovery to follow-up on Plaintiff's December 3, 2013 deposition, Plaintiff requested that Defendants not file their motion to compel the IMEs for at least one week, thereby further delaying the resolution of their dispute.

The recalcitrant behavior displayed by counsel in this case as noted above, will no longer be countenanced by the Court.